BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT SCHROEDER Claimant VS. **MEGA MANUFACTURING, INC.** Respondent AND **HARTFORD INSURANCE COMPANY** Insurance Carrier AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 168,116

ORDER

On June 22, 1995, the Appeals Board heard respondent's and its insurance carrier's request to review the Award of Administrative Law Judge George R. Robertson entered in this proceeding on January 26, 1995.

APPEARANCES

Claimant appeared by his attorney, Stanley R. Juhnke of Hutchinson, Kansas. The respondent and its insurance carrier appeared by their attorney, Mickey W. Mosier of Salina, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Jeffrey E. King of Salina, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is the same as that enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are hereby adopted by the Appeals Board for this review.

ISSUES

(1) What is the nature and extent of claimant's disability?
(2) What is the liability of the Kansas Workers Compensation Fund, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

(1) The claimant should receive an award for permanent partial general disability based upon his ten percent (10%) functional impairment.

We agree with the Administrative Law Judge's finding of a ten percent (10%) functional impairment based upon the uncontroverted testimony of the treating orthopedic surgeon, Dr. Milo Sloo III. However, we disagree that the presumption of no work disability found in K.S.A. 1991 Supp. 44-510e(a) has been overcome. The statute provides:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment . . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The claimant returned to work for the respondent at a comparable wage following his accidental injury and worked for approximately six (6) months. The Appeals Board finds that his termination was unrelated to his injury and resulting disability. He was terminated for cause based upon insubordination. It is true that his back surgery was subsequent to his termination and that he was ultimately released by Dr. Sloo with restrictions. However, from the claimant's own testimony and the testimony from the claimant's supervisor with respondent, Lyle Foss, the Appeals Board finds the weight of the evidence supports a finding that the claimant could have returned to his former job with some accommodations and that the respondent was willing and able to so accommodate the claimant's restrictions were it not for his termination.

(2) The Kansas Workers Compensation Fund should bear no responsibility for this Award.

The purpose of the Kansas Workers Compensation Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A. 44-566(b) provides:

> "'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:
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> . . . .
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> "15. Loss of or partial loss of the use of any member of the body;
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> "16. Any physical deformity or abnormality;
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> "17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. See K.S.A. 1991 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the preexisting impairment but the resulting disability or death was contributed to by the preexisiting impairment. See K.S.A. 1991 Supp. 44-567(a)(2).

In either situation, it is the employer's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 1991 Supp. 44-567(b) provides:

> "In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

An employee, previously injured or handicapped, is not required to exhibit continued disability or to be unable to return to his former job in order to be a "handicapped" employee. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 405, 701 P.2d 336 (1985). Further, mental reservation on the part of the employer is not required. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), Aff'd 242 Kan. 430, 748 P.2d 420 (1988).

The provisions imposing liability upon the Kansas Workers Compensation Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. Morgan v. Inter-Collegiate Press, *supra.*

As indicated above, the Legislature created the Workers Compensation Fund for the basic and primary purpose of encouraging the employment of impaired individuals. Assessing liability against the Fund in situations where that primary purpose is not furthered is improper.

In the case before us, claimant had several injuries to his back before his November 20, 1991 accident at Mega Manufacturing, Inc. Following each, claimant returned to his regular work with little or no lost time and no permanent impairment. In 1989, while in respondent's employ, claimant injured his low back while lifting on a crank arm. In March 1991, claimant again injured his low back. However, he missed no time from work and was released by the treating physician with no impairment and no restrictions. Claimant's job duties were not altered or modified in any respect following his injuries. A Form 88 was filed by respondent's insurance carrier, but it does not appear that claimant was considered nor treated as a handicapped employee by respondent at any time prior to his November 20, 1991 accident.

Dr. Sloo, who first saw claimant on October 20, 1992, testified that if claimant had had low back pain with radiation into the left hip and leg prior to this accident on November 20, 1991, together with positive findings on x-ray of degenerative disc disease, he may have given claimant a three and one-half percent (3½%) impairment rating. However, on cross-examination, he said that if the prior problems were minor and claimant missed no work and was able to continue working without restrictions, he would have diagnosed a minor sprain and given no permanent impairment rating. The evidence shows that claimant did not miss any work following his March 1991 injury and was able to continue working his regular job up to this November 20, 1991 injury. He was treated and released by the company physician, Dr. Christopher P. Rogers, with no restrictions and no permanent impairment rating. Dr. Rogers testified that he diagnosed a mild lumbosacral strain with no radiculopathy at the time he gave claimant a full release without restrictions in April 1991.

Based upon the record as a whole, the Appeals Board finds that the respondent has not met its burden to show that it hired or retained a handicapped worker in its employment after acquiring knowledge of a preexisting impairment. The Appeals Board finds that claimant was not a handicapped employee within the meaning of the statute prior to his November 20, 1991 accident. Therefore, the Kansas Workers Compensation Fund should bear no responsibility for this Award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson entered January 26, 1995 should be, and is hereby, modified in part and reversed in part as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Robert Schroeder, and against the respondent, Mega Manufacturing, Inc. and its insurance carrier, Hartford Insurance Company, for an accidental injury which occurred November 20, 1991, and based upon an average weekly wage of $430.86 through July 7, 1992, for 27.57 weeks of temporary total disability compensation at the rate of $287.25 per week or $7,919.48, followed by 5.29 weeks at the rate of $28.73 per week or $151.98 and, based upon an average weekly wage of $437.26 after July 7, 1992, for 382.14 weeks at the rate of $29.15 per week or $11,139.38, for a

10% permanent partial general body impairment of function, making a total award of $19,210.84.

As of July 14, 1995, there is due and owing claimant 27.57 weeks of temporary total disability compensation at the rate of $287.25 per week or $7,919.48, followed by 5.29 weeks of permanent partial disability compensation at the rate of $28.73 per week in the sum of $151.98, and followed by 157.43 weeks of permanent partial disability compensation at the rate of $29.15 per week in the sum of $4,589.08, for a total of $12,660.54 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $6,550.30 is to be paid for 224.71 weeks at the rate of $29.15 per week, until fully paid or further order of the Director.

Claimant is entitled to medical expenses and unauthorized medical expenses up to $350.00, if any.

Future medical will be considered upon proper application to and approval by the Director.

The Kansas Workers Compensation Fund is not responsible for any portion of this Award, with the exception of its own attorney fees.

The court finds attorney fee retainer is reasonable and approves such fee arrangement, pursuant to the provisions of K.S.A. 1991 Supp. 44-536(a).

Therefore, pursuant to K.S.A. 1991 Supp. 44-536(a), a lien is placed against the Award in the amount of twenty-five percent (25%) in favor of Mr. Stanley Juhnke.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

OWENS, BRAKE & ASSOCIATES

Deposition of Dr. Milo Sloo Dated January 4, 1994	$ 157.47
Regular Hearing Transcript Dated July 14, 1994	$ 281.34

KELLEY, YORK & ASSOCIATES, LTD.

Deposition of Jerry Hardin Dated July 5, 1994	$ 365.70

LORI A. PRATER, C.S.R.

Deposition of Dr. Christopher Rodgers Dated October 19, 1994	$ 164.45
Deposition of Lyle Foss Dated October 19, 1994	$ 128.45

IT IS SO ORDERED.

Dated this ____ day of July, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Juhnke, Hutchinson, KS
Mickey W. Mosier, Salina, KS
Jeffrey E. King, Salina, KS
George R. Robertson, Administrative Law Judge
David Shufelt, Acting Director